

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLEE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,501

437

ROBERT J. LEE,

Appellant,

v.

SAM ANDERSON, Superintendent,
District of Columbia Jail,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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United States Court of Appeals
for the District of Columbia Circuit

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JAN 29 1963

Joseph W. Stewart

CLERK

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

NO. 11,001

APPEAL

FROM THE DISTRICT COURT

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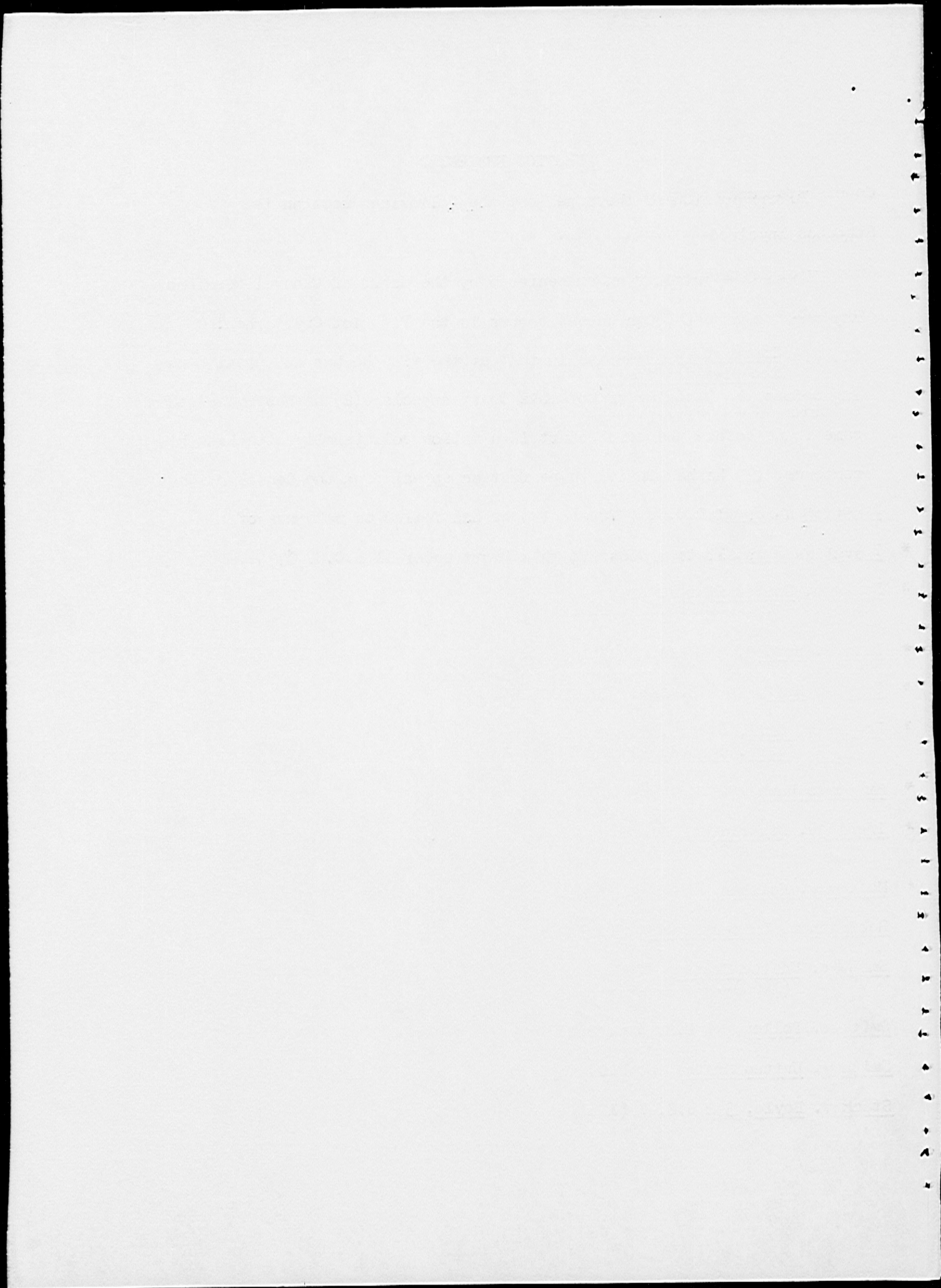
NO. 11,001

QUESTION PRESENTED

In the opinion of the appellee, the following question is presented:

Whether a prisoner under sentence by the Court of General Sessions may seek release through habeas corpus in the District Court when:

(1) his petition is premature in that at the time he has an appeal pending before the District of Columbia Court Appeals; (2) he has raised the same issue before the trial court in a motion collaterally attacking his sentence; (3) he has failed to perfect an appeal from the denial of that motion under 11 D.C.C. §772 and (4) he has failed to make use of available appellate process to this Court under 11 D.C.C. §773.



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SAM ANDERSON, Superintendent,
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Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

This is an appeal from an order of the District Court on December 3, 1962, discharging the rule to show cause and dismissing appellant's petition for a writ of habeas corpus. As is initially pointed out in appellant's brief, recourse to matters beyond the record on appeal is of absolute necessity. References must be made to the files and records of the Court of General Sessions and the District of Columbia Court of Appeals.

Appellant's statement of the facts appears adequate except with reference to appellant's motion under 28 U.S.C. § 2255 which was transmitted by letter to Chief Judge Smith dated October 29, 1962. (See Br. 3, footnote 2.) The motion seeking relief under Section 2255, supra, is contained in Judge Kronheim's file. Also contained therein, and now of record in the Court of General Sessions, is a notation reflecting that on

November 7, 1962, a date subsequent to the receipt of appellant's motion, that motion was considered as a motion for a new trial and denied.

Judge Kronheim advises that appellant was represented by counsel at the new trial motion and that the proceedings were stenographically reported.^{1/}

It must be pointed out that the motion seeking relief in the Court of General Sessions is based on the same grounds as the instant habeas corpus motion.

^{1/} No appeal was taken from the denial of the new trial and appellant has not provided a transcript of those proceedings.

STATUTES INVOLVED

Title 11, District of Columbia Code, Section 772 provides in pertinent part:

(a) Any party aggrieved by any final order or judgment of The Municipal Court for the District of Columbia, as created by sections 11-751 to 11-755, or of the Juvenile Court of the District of Columbia, may appeal therefrom as of right to The Municipal Court of Appeals for the District of Columbia.

Title 11, District of Columbia Code, Section 773 provides:

Review of judgments in United States Court of Appeals for the District of Columbia--Procedure.

Any party aggrieved by any judgment of The Municipal Court of Appeals for the District of Columbia may seek a review thereof by the United States Court of Appeals for the District of Columbia by petition for the allowance of an appeal. The petition shall be in writing and shall be filed with the clerk of said United States Court of Appeals within ten days after the entry of such judgment, the contents of the petition to conform to the requirements which said United States Court of Appeals may by rule prescribe. Said Court of Appeals may prescribe rules governing the practice and procedure on such applications, the preparation of and the time for filing the transcript of the record in such cases, and generally to regulate all matters relating to appeals in such cases. If said Court of Appeals shall allow an appeal, the court shall review the record on appeal and shall affirm, reverse, or modify the order or judgment in accordance with law.

Title 28, United States Code, Section 2241 provides:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless--

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

Title 28, United States Code, Section 2253 provides in pertinent part:

An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause.

Title 28, United States Code, Section 2254 provides:

An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

STATUTE INVOLVED

Title 28 U.S.C. § 2255 provides, in pertinent part:

Federal custody; remedies on motion attacking sentence. - A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

STATUTE REPEALED

Section 12 of the 1922 Act, in so far as it relates to the following:

Where a person is arrested on a warrant issued by a justice of the peace, and is taken to a police station, and is detained there, and is not released within a reasonable time, the person so detained shall be entitled to compensation from the person who issued the warrant, unless the person so detained is a person who is entitled to compensation from the person who issued the warrant.

A person who is entitled to compensation from the person who issued the warrant shall be entitled to compensation from the person who issued the warrant.

Where a person is arrested on a warrant issued by a justice of the peace, and is taken to a police station, and is detained there, and is not released within a reasonable time, the person so detained shall be entitled to compensation from the person who issued the warrant, unless the person so detained is a person who is entitled to compensation from the person who issued the warrant.

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SUMMARY OF ARGUMENT

There was no issue before the District Court over which it had cognizance. Appellant cannot use a habeas corpus petition concurrently with direct appeal. He must pursue the adequate remedies available to him in the Court of General Sessions, the District of Columbia Court of Appeals and this Court through a petition for an allowance of appeal.

ARGUMENT

There Was No Issue of Fact
Properly Before the District Court

Appellant contends that the record in the instant case, specifically appellant's affidavit, "created an issue of fact regarding the trial court's denial of the Constitutional Right to a fair trial" (Br. 5). Appellee agrees that if there was an issue of fact cognizable in the District Court, a hearing thereon would be required. This hearing would probably include testimony from Judge Kronheim, his clerk, his bailiff, the Assistant United States Attorney who tried the case, appellant's defense counsel and appellant, himself.^{2/} However, in appellee's view there was no issue presented which is cognizable in the District Court.

Appellant in the Court of General Sessions sought relief under 28 U.S.C. §2255. That court had inherent authority to entertain such motion. Burke v. United States, (D.C. Mun. App., 1954), 103 A.2d 347, 351; Ingols v. District of Columbia, (D.C. Mun. App., 1954), 103 A.2d 879, 880.

Section 2255 provides:

"A prisoner in custody under sentence of a court established by Act of Congress claiming a right to be released . . . may move the court which imposed the sentence to vacate, set aside, or correct the sentence."

The Court of General Sessions is a court created by Act of Congress.

See 11 D. C. Code §701, et seq. But see: H. Rep. No. 3521, 81st Cong., 1st Sess. (1949), 2 U.S. Code & Congressional Service. ^{Page 1271}

^{2/} However, assuming a remand, in appellee's view, such a hearing would not be required if the District Court had before it the files and records of the Court of General Sessions and the District of Columbia Court of Appeals in the instant case.

The trial court reviewed the motion as one for a new trial and held a hearing, and denied relief. At the hearing, appellant was represented by counsel. Appellant did not note an appeal from that decision as he could have done. See 11 D.C.C. §772(a). It should be noted that leave to appeal from the judgment and commitment of October 17, 1962 was not denied until December 4, 1962, which was subsequent to the time when court-appointed counsel submitted his memorandum. Under Rule 16 and Rule 27(a), District of Columbia Court of Appeals Rules, notice of appeal should have been filed within 10 days of that denial.^{3/}

After the District of Columbia Court of Appeals denied the forma pauperis appeal on December 4, 1962, petitioner filed motion for reconsideration on December 17, 1962. See Rules 44(b) and 44(c) of that court's Rules.^{4/} The motion for reconsideration having been denied on December 26, 1962, appellant sought no further review.

Pursuant to the provisions of Title 11, D. C. Code, Section 773, appellant had 10 days in which to petition for allowance of appeal to this Court. His having failed to do so. would preclude further review. Cf. Robinson v. United States, 361 U.S. 220 (1960).

^{3/} It is undisputably clear that the trial court had jurisdiction to entertain the post-conviction motion. See Smith v. Pollen, 90 U.S. App. D.C. 178, 194 F.2d 349 (1952). It is also equally clear that such a denial could have been consolidated on appeal with the appeal from the judgment and commitment then pending. See Daniel Smith v. United States, 109 U.S. App. D.C. 28, 31, 283 F.2d 607, 700 (1960).

^{4/} It might appear that this latter motion was one day late since motions for "rehearing" must be filed before the mandate is transmitted. However, no mandate would have been transmitted with a mere denial of a free appeal. The appeal is still pending. It has never been docketed and dismissed. See Rule 33 of the District of Columbia Court of Appeals Rules.

Appellant, however, must be charged with having taken the position that despite a clear and adequate statutory procedure for review of orders and judgments of the Court of General Sessions and the District of Columbia Court of Appeals he may, nonetheless, seek contemporaneously^{5/} with his taking direct appeal, relief by means of habeas corpus in the United States District Court. Such a course of legal procedure should neither be allowed nor is warranted in the presence of an exclusive and adequate mode of review pursuant to 11 D.C.C. §772 and 773. Cf. Darr v. Buford, 339 U.S. 200 (1950); Ex parte Hawk, 321 U.S. 114 (1944); Mooney v. Holohan, 294 U.S. 103, 113, 115 (1935); Anderson v. Jones, 281 F.2d 684 (6th Cir., 1960) and United States Ex Rel Hunter v. Bibb, 249 F.2d 839 (7th Cir., 1957), and Title 28 U.S.C. 2254. See also Boykin v. Huff, 73 App. D.C. 378, 385-6, 121 F.2d 685, 692-3 (1941); Eury v. Huff, 79 U.S. App. D.C. 289, 146 F.2d 17 (1944); Fowler v. Gill, 81 U.S. App. D.C. 167, 156 F.2d 565 (1946), cert. denied, 329 U.S. 791; and Smith v. United States, 88 U.S. App. D.C. 80, 85, 187 F.2d 192, 195 (1951) holding that motions seeking to collaterally attack a judgment of conviction may not operate as substitute for appeal. See also Section 2255, supra, last paragraph, proscribing the entertainment of an application for a writ of habeas corpus on behalf of a prisoner who is authorized to apply for relief under

^{5/} He filed the instant habeas corpus petition on November 16, 1962, while his appeal from the judgment and commitment was then pending in the District of Columbia Court of Appeals.

^{6/}Section 2255 and see Stack v. Boyle, 342 U.S. 1 (1951) where habeas corpus was held unavailable as a substitute for an adequate remedy to reduce bond.

In conclusion, appellee submits that to allow any prisoner under sentence from the Court of General Sessions to petition for a writ of habeas corpus in the District Court, either while, as in the instant case, he has an appeal pending or in any case where the prisoner could have appealed to the District of Columbia Court of Appeals and this Court and did not do so, would be to permit a bifurcation of the appellate process; or at the intolerable least, would require the District Court to act as a parallel court of appeals from orders and judgments of the Court of General Sessions. There is provided a simple and adequate method of review from such orders or judgments and the clear intent of Congress was that this method be the sole and exclusive method of seeking review of those orders.

^{6/} Appellant having sought relief under §2255 in the Court of General Sessions on the same grounds he presented to the District Court, would seem to fall within the repetitive motion limitation of the fifth paragraph of Section 2255. He should not be allowed to do so by the mere change of name to "Habeas Corpus" and the selection of a different and inappropriate form. Compare Moore v. United States, 108 U.S. App. D.C. 14, 278 F.2d 459 (1960). Moreover, appellant having failed to perfect his appeal wherein the present issue could have been raised is now precluded from doing so through substitution of habeas corpus proceedings.

CONCLUSION

Wherefore, it is respectfully submitted that the instant appeal be dismissed for want of jurisdiction in the District Court or, in the alternative, the order of the District Court be affirmed.

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